NO. 86-1229

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19___

FILED
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JOSEPH F. SPANIOL, JR.
CLERK
Supreme Court, U.S.

RAY A. GARCIA,

Appellant,

v.

STATE OF INDIANA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED FOR REVIEW

Whether the roadblock herein was violative of Appellant's Fourth Amendment and Fourteenth Amendment right to be secure in his person against unreasonable search and seizure.

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The Petitioner, Ray A. Garcia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Indiana, the State Court of last resort.

OPINIONS BELOW

The Hendricks Superior Court #2 granted Appellant's Motion To Suppress on November 1, 1984. The State filed its appeal therefrom in the Court of Appeals on April 15, 1985. On August 1, 1985, the First District, Court of Appeals of Indiana, reversed the trial court in a written opinion found at 481 N.E.2d 148. Defendant filed his Petition For Rehearing on August 20, 1985, which was denied in a written opinion on February 27, 1986. Defendant filed his Petition For Transfer on March 19, 1986. The Petition For Transfer was granted in a written opinion upholding the Court of Appeals decision on November 20,

1986. The opinion was published at 500 N.E.2d 158.

JURISDICTION

The Supreme Court of Indiana's decision upon Appellant's Petition To Transfer is a "final judgment . . . rendered by the highest court of a State in which a decision could be had . . ." pursuant to the provisions of 28 U.S.C. §1257.

The Jurisdiction of the Court is invoked under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable, searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On June 6, 1984, the State filed an information charging the Defendant with driving while intoxicated, the second such offense within the past five years, a class D felony. Probable cause for arrest was found and the Defendant entered a plea of not guilty. The Defendant by counsel filed a motion to suppress with a supporting memorandum on September 17, 1984, and a hearing on said motion was held on October 2, 1984. The trial court took the motion under advisement and on November 1, 1984, granted the motion. (The trial court's finding of facts and conclusions of law are included as Appendix B).

The primary thrust of Appellant's Motion To Suppress was that his arrest was in violation of the Fourth and Fourteenth Amendments of the United States Constitution in that the arrest was a result of a temporary roadblock.

Appellant was arrested by Indiana State Police Officer James Cramer. Officer Cramer was also the supervisor of the roadblock. The purpose of the roadblock was to check for improperly licensed operators and vehicles, under-age drinkers and intoxicated drivers.

Officer Cramer, a field officer and sergeant, along with Sheriff's officers and field deputies determined the location. The record does not

include the experienced data upon which the decision was made.

The roadblock procedures used in this case are:

(1) Knowledge of roadblock location. The State police released prior publicity through the newspapers of the plan to conduct roadblocks, but did not indicate particular locations or counties.

(2) Selection of location. Several possible roadblock locations were selected by a sergeant who supervises the State Police troopers in Hendricks County. He then conferred with a lieutenant and another officer of the Hendricks County sheriff's department and the participating field

officers; a joint decision was made on the roadblock location. They chose this location "because it was on print outs that our department has, it shows that the road generates a lot of driving accidents involving alcohol percentage wise on the road." None of this data is part of the record. As noted above, the effectiveness of this roadblock in detecting drunk drivers is essentially unknown.

(3) Guidelines. The sergeant who was ordered to do the roadblock received "nothing in writing" about methodology. He did have "some information from Marion County and Morgan County. Guidelines they had set down." The record does not contain

any written plan or indicate what the supervisor on site conveyed to those working the roadblock. "Basically, it is just common sense about the way you do things," he testified.

(4) Roadblock operation. Westbound traffic on U.S. 40 was stopped by 11 uniformed officers. The left lane was funnelled into the right westbound lane using flares and the red flashing lights of two police cars; one car parked in the passing lane and the second car parked on the shoulder. The roadblock gave an approaching motorist no forewarning until 2/10 to 4/10 of a mile preceding the roadblock. Oncoming traffic could and did turn around and avoid the

roadblock. As stated by Sgt. Cramer, the motorists might have turned around on the assumption that the congestion was an accident. A State Police sergeant was in charge of the participating State Police and a lieutenant with the sheriff's department supervised the county officers. Cars were stopped in groups of five, while the officers were investigating one group the remaining traffic passed through the roadblock without questioning, then another group of five would be questioned after the officers had finished with the preceding group. Among the neutral criteria for selecting vehicles, according to the testimony, was

"luck." If a person was suspected of drunk driving then the driver would be further detained at a secondary location adjacent to the roadblock.

(5) Safety considerations. Approaching motorists were not warned that a roadblock was ahead. Moreover, an approaching motorist would not see the flares until he was within two to four tenths of a mile.

ARGUMENT

The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting

detention quite brief. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979), 59 L.Ed.2d 660.

It is uncontroverted by the State that Appellant was stopped and detained solely as a result of a roadblock and not as a result of probable cause or an articulable suspicion.

The permissibility of the roadblock detention is judged by balancing its intrusion on Fourth Amendment interest against its promotion of legitimate governmental interest.

This Court has most recently decided the following cases providing guidance as to the constitutionality

of roadblock stops of vehicles: Brown v. Texas (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (random stop-and-identify statute held unconstitutional); Delaware v. Prouse (1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (random and discretionary stops made to check for license and vehicle registration held unconstitutional); United States v. Martinez-Fuerte (1976), 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (permanent roadblock checking for illegal aliens from Mexico held constitutionally valid); United States v. Brignoni-Ponce (1975), 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (random stops of vehicles near

Mexican border to detect entry of illegal aliens held unconstitutional). These cases have set forth limitations on the police when maintaining roadblocks.

It is dicta within the Prouse case upon which the State and State appeal courts found their premise of constitutionality. Specifically:

> . . . This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on

> public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

In Brown v. Texas, 443 U.S. at 50, 99 S.Ct. at 2460, 61 L.Ed.2d at 362, the Court enunciated three factors to be weighed in determining the reasonableness of seizures that are less intrusive than a traditional arrest: (1) the gravity of the public concerns served by the seizure, (2) the degree to which seizure advances the public interest, and (3) the severity of interference with individual liberty. Brown stated that a "central concern" in assessing the reasonableness of a traffic stopping scheme was to make certain:

> . . . an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

Id. at 51, 99 S.Ct. at 2640, 61 L.Ed. 2d at 362. Brown further stated:

> . . . [T]he seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Id.

Appellant contends the seizure herein was unreasonable. The seizure was the result of a makeshift temporary roadblock. Sgt. Cramer of the

Indiana State Police was the supervisor of the roadblock as well as the arresting officer of Appellant. Sgt. Cramer, with county deputies and without articulable data in the record chose a place on Highway 40 just inside the county line. There had been, previous to the roadblock, some unidentified general publicity in newspapers in areas unknown relating to a plan to conduct roadblocks. No written or explicit guidelines exist in the record, only a statement by Sgt. Cramer that he had some information about guidelines from other counties. It is not known from the record whether the other officers at the roadblock were apprised of this

"information."

Also, at contention is the physical surroundings of the roadblock. The trial court, upon hearing evidence, viewing pictures and from the area in issue, found the locale to be:

> (1) A four lane dimly lighted area, of high traffic volume west of, and in close proximity to, a drinking establishment beyond an elongated curve.
>
> (2) A high accident area where a police officer investigating a traffic accident had been previously struck and injured.
>
> (3) The location included a relatively small shoulder area of approximately six feet in width, was in general disrepair and bordered

> upon an open ditch, and was lacking any basic safety devices to include guardrails, adequate lighting or median strips.

Vehicles were stopped in groups of five. What five to stop was at the police's complete discretion.

Appellant is not unmindful of the carnage caused by drunk drivers. Howver, no evidence exists in the record indicating that a roadblock is necessary or more effective than the less intrusive method availed by the articulable suspicion requirement. As stated by the Indiana Supreme Court:

> . . . This is not to imply that traditional methods of detecting drunk driving are ineffective.

Therefore, it is readily apparent that the roadblock cannot pass consti-

tutional muster in light of the gravity of the public concerns, which may effectively be served by less intrusive means, being greatly outweighed by the low degree to which the seizure advances the public interest and the severity of the interference with individual liberty.

CONCLUSION

It is respectfully submitted by Appellant that the seizure herein is in violation of the rights in the Fourth and Fourteenth Amendments of the United States Constitution prohibiting unreasonable seizures. As stated by Sgt. Cramer:

> . . . "a lot depended upon on the luck of the draw whether or not you were stopped

> that night", and that defendant "was one of the unlucky five who were pulled over."

Further, Appellant would respectfully direct the Court to the dissent to the majority opinion of the Supreme Court of Indiana for an artful portrait of Appellant's circumstances and contentions.

For the foregoing reasons, Appellant prays the Court will grant certiorari, and order the trial

court's original order of suppression be reinstated.

Respectfully submitted,

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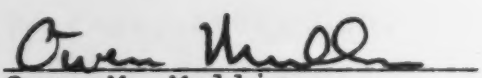
CERTIFICATE OF SERVICE

I, Owen M. Mullin, a member of the Bar of the Supreme Court of the United States and counsel of record for Ray A. Garcia, appellant herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition For Writ Of Certiorari On Appeal From The Supreme Court Of Indiana as follows: on the State of Indiana, Appellee, to Hon. Linley E. Pearson, Attorney General of Indiana, attorney of record for the State of Indiana, Appellee, at his office located at 219 State House, Indianapolis, IN 46204, this 20th day of January, 1987, by 1st class, United States Mail, postage prepaid.

All parties required to be served have been served.

Dated January 20, 1987.



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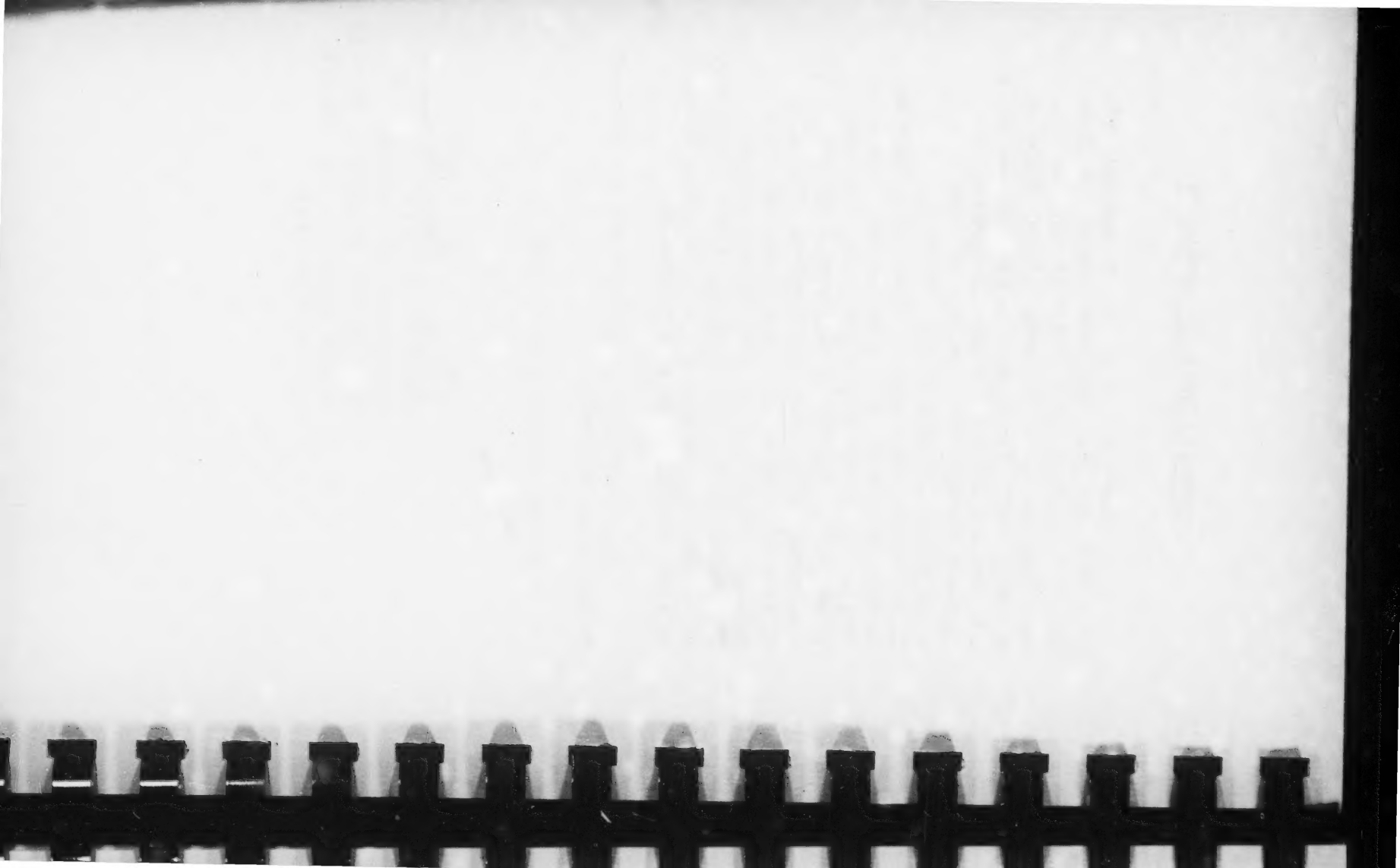


APPENDIX "A"

STATE of Indiana,

Appellant,

v.

Ray A. GARCIA,

Appellee.

No. 32S01-8611-CR-987

Supreme Court of Indiana

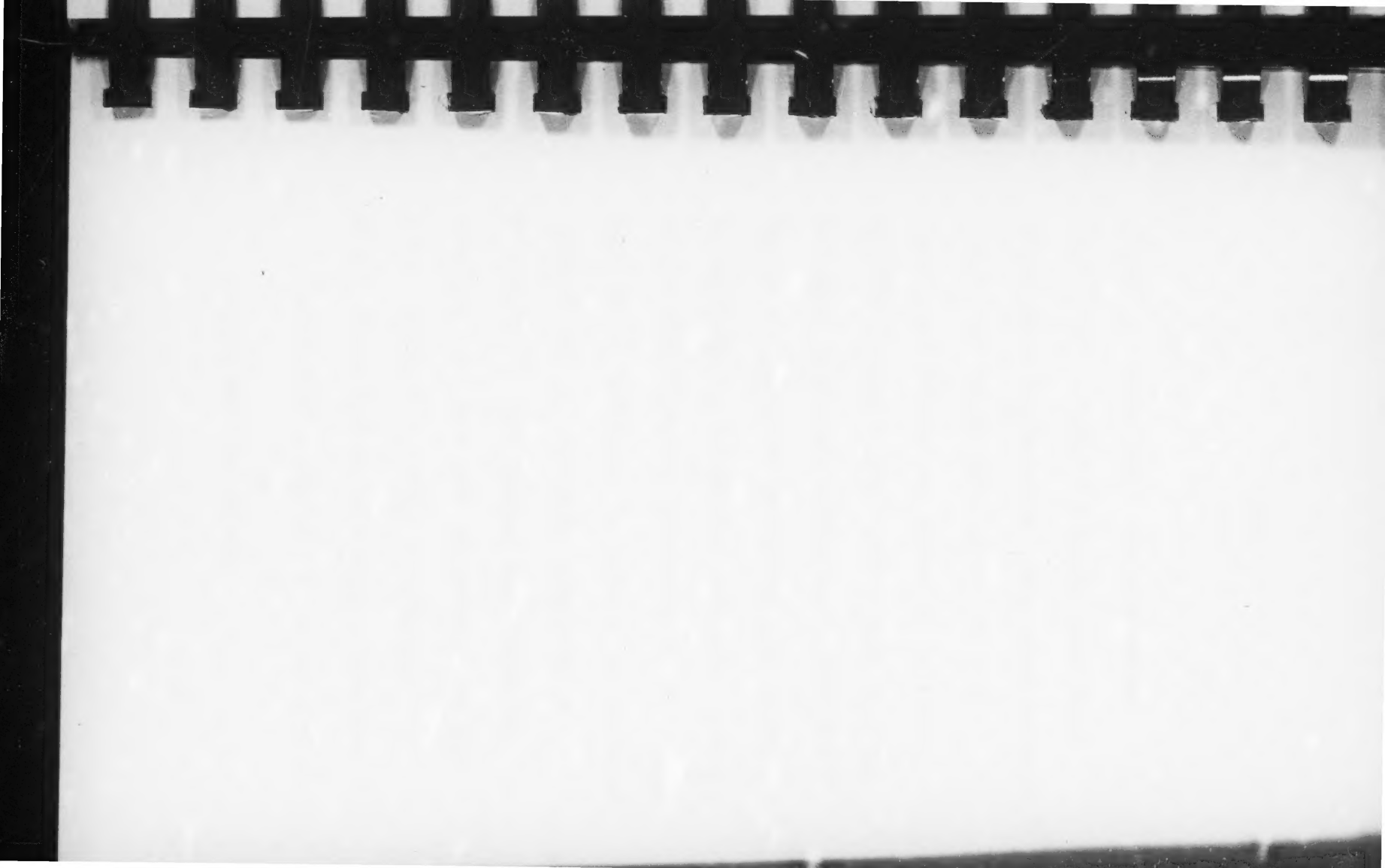
Nov. 20, 1986

Linley E. Pearson, Atty. Gen., Lee Cloyd, Deputy Atty. Gen., Indianapolis, for appellant.

Robert W. Freese, Elmendorf, Meyer & Freese, Brownsburg, for appellee.

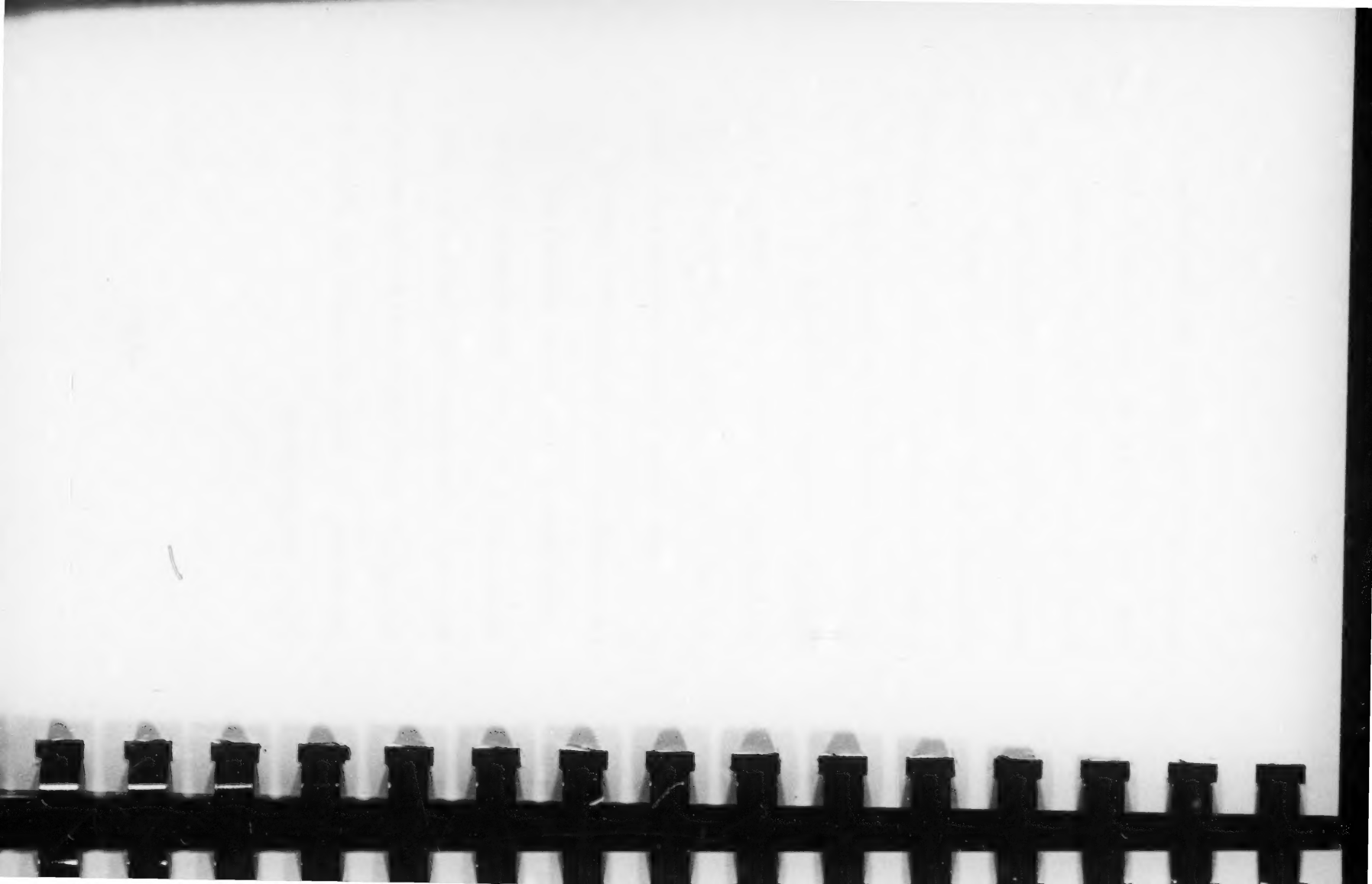
PIVARNIK, Justice.

This cause comes to us on a criminal petition to transfer from the First District Court of Appeals. Petition is brought by Appellee, Ray A. Garcia. The Hendricks Superior Court, No. 2, granted Appellee's motion to suppress evidence of driving while intoxicated obtained at a roadblock in Hendricks County. The State of Indiana appealed the trial court's order to suppress. State v. Garcia (1985), Ind. App., 481 N.E.2d 148. The Court of Appeals, First District, reversed, holding the roadblock procedures used were constitutional. Appellee petitions this Court to transfer. We now grant



Appellee's Petition to Transfer, however, fully agreeing with the holding of the Court of Appeals. We grant transfer for the purposes of addressing an issue in need of clarification and to resolve an apparent conflict created between State v. Garcia, supra, and State v. McLaughlin (1984), Ind. App., 471 N.E.2d 1125, trans. denied.

The sole issue addressed herein is whether the Hendricks County roadblock procedures violated Appellee's Fourth Amendment right against unreasonable searches and seizures such that evidence obtained pursuant to the procedures should have been suppressed.



The pertinent facts of this case were well summarized by the Court of Appeals as follows:

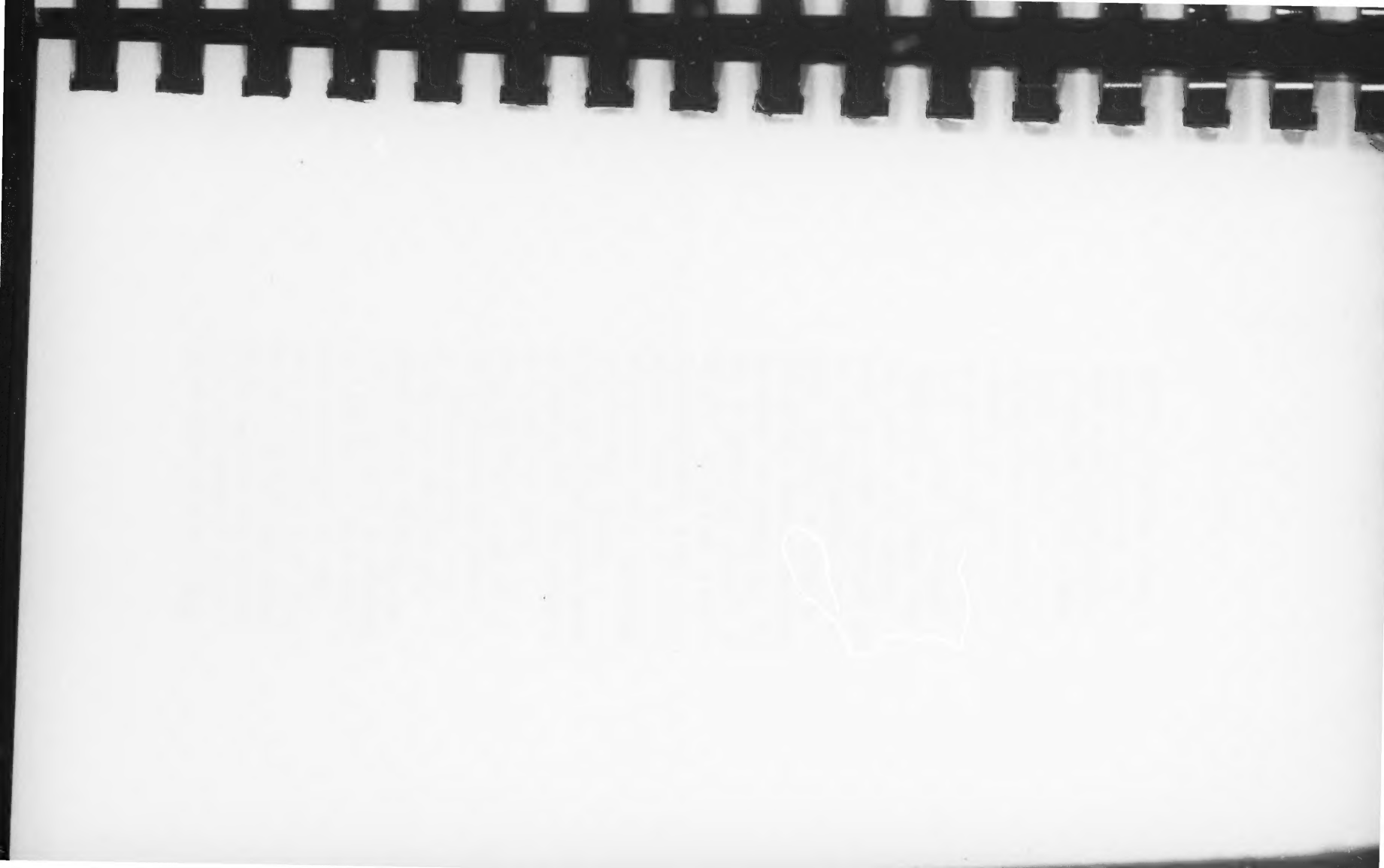
> The Indiana State Police, pursuant to a statewide program in cooperation with the Hendricks County Sheriff's Department, conducted a roadblock on U.S. 40, two and one-half miles east of Plainfield in Hendricks County. The purpose of the roadblock was to check for improperly licensed operators, improperly registered automobiles, underage drinking, and persons driving while intoxicated. The State Police released prior publicity in various newspapers concerning the general plan to conduct roadblocks, but not of roadblocks in any

specific location. The particular spot at issue was selected by Officer James B. Cramer, Supervisor of the Indiana State Police in Hendricks County, and Lt. Daniel Williams of the Hendricks County Sheriff's Department. Their decision was based upon information obtained from State Police records which reflected that this location in the road generated numerous fatal and non-fatal accidents involving alcohol, including an incident where a deputy sheriff was struck by a drunk driver while supervising a wreck. The roadblock was implemented in accordance with a pre-arranged plan generated by Marion County and Morgan County, which was adopted by the Indiana State

Police Department. The plan was developed in accordance with recent Supreme Court decisions.

Pursuant to the plan, the westbound traffic on U.S. 40 was stopped by approximately 11 uniformed officers who were visible on the highway. They blocked off the left westbound lane whereby all traffic was funneled into the right westbound lane, using flares and the lights from police cars to identify the roadblock. Nonselectively, cars were stopped in consecutive groups of five. Absent the detection of drinking or other violations, drivers were detained for no more than two or three minutes, during which time other traffic was permitted to pass. After a group of

five was inspected and released, the next group of five cars traveling west was brought in, and the procedure was repeated. The drivers of the stopped cars were asked to produce operators licenses and registration certificates. If a violation was suspected, or alcohol consumption was detected, such operator was pulled over into a restaurant and motel parking lot. As relevant here, a driver suspected of alcohol consumption was given a field blood alcohol test. Any driver found to be over the presumptive limit of .10 blood alcohol content was then taken to the Hendricks County Jail where a breathalyzer test was administered. Upon failure of this second test,



the operator was arrested. The berm near the roadblock was adequate for safety purposes, the area was lighted, and the roadblock was visible for a considerable distance. Additionally, the officers at the roadblock had absolutely no latitude or discretion to depart from the procedure set out in the plan. Numerous motorists, upon sighting the roadblock, turned their vehicles around and fled.

Garcia, who exhibited no erratic or suspicious driving, was in the first group of five cars stopped. He could produce no operator's license, whereupon an officer who was present recognized him and stated Garcia's operator's license had been

> suspended. After detecting alcohol on Garcia's breath, the officer read him an implied consent statement. Garcia agreed to take a field test, which he failed. Upon his subsequent failure of a breathalyzer test, Garcia was arrested. He was charged with his second offense of driving while intoxicated.
>
> The roadblock was maintained for two hours. During this time, the officers stopped approximately 100 cars, issued 20 citations, and arrested seven persons for driving while intoxicated.
>
> State v. Garcia, 481 N.E.2d 149-150.

The United States Supreme Court has most recently decided the

following cases providing guidance as to the constitutionality of roadblock stops of vehicles: Brown v. Texas (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (random stop-and-identify statute held unconstitutional); Delaware v. Prouse (1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (random and discretionary stops made to check for license and vehicle registration held unconstitutional); United States v. Martinez-Fuerte (1976), 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (permanent roadblock checking for illegal aliens from Mexico held constitutionally valid); United States v. Brignoni-Ponce (1975), 422 U.S. 873, 95 S.Ct. 2574,

45 L.Ed.2d 607 (random stops of vehicles near Mexican border to detect entry of illegal aliens held unconstitutional). These cases have set forth limitations on the police when maintaining roadblocks. However, the United States Supreme Court explicitly recognized that roadblocks may be conducted in a constitutional manner for checking for driving violations in Prouse, supra. In Prouse, the Court struck down a random, discretionary stop made to check for vehicle license and registration, but stated:

> This holding does not preclude the . . . States from developing methods for spot checks that involve

> less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that [license and registration checks] reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. (Emphasis added).

Prouse, 440 U.S. at 663, 99 S.Ct. at 1401, 59 L.Ed.2d at 673. Thus, in Prouse not only did the United States Supreme Court recognize the legitimacy of the State's concern in checking for

licenses and registrations, but they also recognized the need for non-discretionary procedures in obtaining such ends. Further, in Brown v. Texas, 443 U.S. at 50, 99 S.Ct. at 2640, 61 L.Ed.2d at 362, the Court enunciated three factors to be weighed in determining the reasonableness of seizures that are less intrusive than a traditional arrest: (1) the gravity of the public concerns served by the seizure, (2) the degree to which seizure advances the public interest, and (3) the severity of interference with individual liberty. Brown stated that a "central concern" in assessing the reasonableness of a traffic stopping scheme was to make certain,

"an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. at 51, 99 S.Ct. at 2640, 61 L.Ed.2d at 362. Brown further stated, "[T]he seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Id.

We now examine the constitutionality of the Hendricks County roadblock procedure in light of Prouse and Brown to determine if evidence seized pursuant thereto was seized unconstitutionally. The first determination to be made is whether this particular

roadblock entailed random or discretionary stops, thereby running afoul of the rule in Prouse. This roadblock stopped five consecutive cars at a time, waving through for the following two to three minutes it took to conduct the check on the five cars being inspected. After a group of five was inspected and released, the next five consecutive vehicles were detained for the same procedure. All motorists of the stopped cars were asked to produce operators licenses or registration certificates. If a violation was suspected or alcohol consumption detected the driver was then pulled over to an adjacent parking lot. In our view, not only did this procedure

adequately protect against the random and selective proscription of Prouse, but it further minimized the severity of interference with individual's liberties by not detaining motorists that the police could not inspect within a reasonable period of time.

[1,2] Next, this roadblock procedure must be examined in light of the balancing factors enunciated in Brown. The first factor set out in Brown, the gravity of the public concerns served by the seizure, is weighed in favor of the State's roadblock procedure. As recognized in Prouse, the States have a legitimate concern in checking for automobile registration and certification.

However, in our opinion this State has a much graver concern in detecting and deterring driving while intoxicated and under-age drinking. Approximately seven (7%) percent of the drivers checked that specific evening were intoxicated. The average number of deaths per year for the last ten (10) years attributable to drunk drivers in the United States is 25,000. The Supreme Court of the United States has recognized that the current state of affairs has resulted in such terrible carnage wreaked upon society by drunk drivers that the slaughter exceeds that of all our wars. South Dakota v. Neville (1983), 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748. Whatever

the statistical comparison made, it is evidence our society has a grave concern in apprehending and deterring drunken driving and that traditional methods have not effectively combatted the problem. Consequently, public interest in detecting and deterring drunk driving is to be heavily weighed in favor of this particular roadblock procedure.

The second factor of Brown deals with the degree to which the seizure advances the public interest. This roadblock procedure advanced detection and prevention of drunken driving and detection of unlicensed driving to a successful degree, based on the available data. The State police

released prior publicity in numerous newspapers concerning the plan to conduct roadblocks, but not of roadblocks in any specific location. This particular roadblock was maintained for two hours, during which twenty (20) citations were issued and seven arrests were made for driving while intoxicated. Considering approximately one hundred (100) cars were stopped during the two hours, the sucesss of detection of violations being sought was very high. Accordingly, the second balancing factor of Brown weighs heavily in favor of this roadblock procedure. Future deterrence can only be speculative, but as the Supreme Court of Virginia

stated in Lowe v. Commonwealth of Virginia (1985), 230 Va. 346, 337 S.Ed.2d 273, 277, cert. denied ___ U.S. ___, 106 S.Ct. 1464, 89 L.Ed.2d 720 (1986), in upholding a similar roadblock program:

> [T]he deterrent effect of such a highly publicized program is obvious; such a visible project is bound to increase the perceived risk of arrest in the minds of those drunk drivers who are never arrested.

The third factor enunciated in Brown must finally be considered: namely, the severity of interference with individual liberties. We are of the opinion that though a motorist's reasonable expectation of privacy is

impinged upon to some degree, the severity of interference is minimal especially when considered in light of the great public concern involved here and the degree of successfully abating the social evil being addressed. Motorists involved in this roadblock were stopped for approximately two to three minutes. As a group of five consecutive cars were inspected, the following traffic was allowed to proceed. Despite announcements in local newspapers prior to the roadblock operation, the exact time and location was not announced. Obviously, such an announcement would have defeated the operation's purpose. Some citizens were undoubtedly delayed

in their travels, however, numerous motorists, upon sighting the roadblock, turned their vehicles around and fled. Additionally, due to the high rate of arrests, the detained motorists not found to have violated any laws were directly benefited by the removal of intoxicated drivers in the immediate vicinity. Balancing the Brown factors, we must conclude that the gravity of the public concern and the degree to which this roadblock procedure advanced detection and abatement of drunken as well as unlicensed driving outweighed the low level of interference with individual liberties.

Because of the overwhelming con-

cern voiced by the United States Supreme Court regarding procedures such as this roadblock, we note that this roadblock plan entailed a "plan embodying explicit, neutral limitations on the conduct of individual officers." Brown, supra. The group of five cars, located in a well lighted area, were each asked to produce a license or registration. If a valid license or registration were produced and no indication of intoxication or underage drinking were detected, the car was allowed to proceed. All the officers were instructed as to this procedure and it was uniformly followed the entire two hours, thereby meeting the neutral

plan requirement of Brown.

To the extent State v. McLaughlin, supra, conflicts with the law set out in this opinion, it is hereby overruled. McLaughlin can be interpreted to stand for the ruling that patrolling the roads and observing traffic is an equally efficient way to apprehend intoxicated drivers as stopping all motorists at roadblocks and examining them, thus precluding the use of roadblocks. We disagree with this broad statement and find that roadblock procedures, conducted in a constitutional manner can be a more effective means of detecting and deterring the important public concerns of driving while intoxicated

or without proper licensing. This is not to imply that traditional methods of detecting drunken driving are ineffective. The procedure used in the roadblock in the immediate case is a good example of constitutionally valid roadblock operation. Having found the roadblock procedure in the instant case constitutional, it follows that the trial court erred in granting Petitioner Garcia's motion to suppress evidence. Accordingly, the trial court is reversed and ordered to proceed consistent with the opinion set out herein.

GIVAN, C.J., and DICKSON, J., concur.

DeBRULER, J., dissents with separate opinion in which SHEPARD, J., concurs.

SHEPARD, J., dissents with separate opinion.

DeBRULER, Justice, dissenting.

It is written in §11 of the Indiana Bill of Rights that: "The right of the people to be secure in their persons, . . ., against unreasonable . . . seizure, shall not be violated; . ." It is elementary and fully recognized by the majority opinion that the stopping of a car by the police on a public thoroughfare to investigate for crime constitutes a seizure of the driver and all other occupants of the car. In Rutledge v. State (1981), Ind., 426 N.E.2d 638, this court squared up to the issue in this manner:

> Appellant contends that the police action in stopping his truck was an unreasonable seizure in viola-

tion of the Fourth and Fourteenth Amendments and Art. I, §11, of the Indiana Constitution, and that evidence flowing from it and his attendant detention should have been excluded at trial. The stopping of a single car upon the street constitutes a physical and psychological intrusion upon the occupants of it, interferes with freedom of movement, causes inconvenience and consumes time. The show of authority is unsettling and creates substantial anxiety. Delaware v. Prouse (1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660. Even a brief stop of an automobile and detention of its occupants constitutes a seizure, and is unreasonable in

contravention of the Fourth Amendment in the absence of specific articulable facts which reasonably support an inference of a violation of the laws respecting use of the vehicle. United States v. Brignoni-Ponce (1975), 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607; State v. Smithers (1971), 256 Ind. 512, 269 N.E.2d 874. In order to determine the reasonableness of such a warrantless intrusion, the court must examine the facts known to the officer at the time he stopped the car, and determine from those specifically articulable facts, and reasonable inferences from them, whether they reasonably warrant a suspicion of unlawful conduct. United

States v. Brignoni-Ponce, supra; Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; Lawrence v. State (1978), 268 Ind. 330, 375 N.E.2d 208.

The officers expressly testified on the motion to suppress which the trial judge sustained, that they had not observed this defendant Garcia, or any of the other hundred drivers, or any of the many others who were occupants of the cars caught up in this mass detention, conduct him or herself in such a manner as to give rise to a reasonable suspicion of unlawful conduct. Indeed, the police had no other form of knowledge or information of any sort that any other individual was

then upon this highway at this location and time who had violated or might be in the process of violating the law. In my opinion it is the time-honored requirement that there be an individualized, articulable suspicion of criminal intent or criminal conduct of a person, whether that person stands alone or within a group, which strikes the correct balance between the rights of citizens or groups of citizens and their government's interest in exercising the power to seize.

While I am not persuaded to abandon the existing standards in this situation, I believe it is important to mark recognition of the fact that

the new standard spun by the majority is based upon cases of the Supreme Court of the United States, which did not involve the type of traffic offender roadblocks which we have in this case. Therefore, wholesale reliance upon them is tenuous at best. Furthermore, in Prouse, supra, the court says within the longer quotation in the majority opinion that "questioning of all oncoming traffic at roadblock-type stops is one possible alternative." Two justices concurring specially saying ". . . I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point) that

equate with, but are less intrusive than, a 100% roadblock stop." This observation drew no corrective response from the majority of the court. The procedure employed in the case before us did not involve the selection of all cars or even every 10th or 25th or 50th car, but as described, five cars were pulled from the stream, and others were then waved on through until those five were fully dealt with. Then five more were pulled over, and so on. This procedure provided an opportunity more than twenty times during the two hour period of the roadblock to used non-neutral criteria in selecting the cars to be pulled off. That opportunity

alone casts serious doubt about the character of this roadblock under the majority's new standards.

SHEPARD, J., concurs.

SHEPARD, Justice, dissenting.

While it is clear that some roadblocks conform to the requirements of the Fourth Amendment, I am unable to find the same comfort in the case law of the U. S. Supreme Court in which the majority takes refuge. Each of the major decisions cited in support of today's ruling held a particular seizure unreasonable, save one approving a roadblock used by the national government to safeguard the country's frontier. A brief synopsis of these cases and the analytical

principles which they provide unveil the deficiencies in the roadblock which "seized" appellee Ray Garcia.

I. Supreme Court Cases

A. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Two officers who had parked their car at the side of the highway decided to stop a vehicle to question the occupants about their citizenship and immigration status. They selected respondent's car solely because the occupants appeared to be of Mexican descent. The Supreme Court held that such roving patrols may stop vehicles with less than probable cause:

> . . . because of the importance of the governmental interest at stake, the minimal intru-sion of a brief

> stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

422 U.S. at 881, 95 S.Ct. at 2580.

The Court announced this as an extension of the so-called "Terry stop," which requires that the police officer "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant . . .

the belief that his safety or that of others is in danger." Terry v. Ohio, 392 U.S. 1, 21, 27, 88 S.Ct. 1868, 1880, 1883, 20 L.Ed.2d 889, 906, 909 (1968). Approving roving patrol stops without requiring reasonable suspicion, the Court said, would subject lawful motorists to "potentially unlimited interference with their use of the highways . . . ." 422 U.S. at 882, 95 S.Ct. at 2581. Justice Powell wrote: "We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic," particularly because the "nature of illegal alien traffic . . . tend[s] to generate articulable grounds for identifying

violators." 422 U.S. at 883, 95 S.Ct. at 2581.

B. United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

The Court held that vehicle may be stopped at a permanent immigration checkpoint for brief questioning of the occupants even though there is no reason to believe that any particular vehicle contains illegal aliens. In this case, every car which entered the checkpoint was slowed to a "complete, if not virtual, halt." 428 U.S. at 546, 96 S.Ct. at 3078. Those cars which the Border Patrol suspected carried illegal aliens were directed to a secondary stop where the occupants were asked to produce citi-

zenship or immigration documents. Selection for this secondary investigation was completely discretionary and not based upon reasonable suspicion.

The Court first examined the context in which the constitutional question of reasonable seizure arose. The national policy to limit immigration into the United States was frustrated by the flux of illegal aliens, 85% of whom came from Mexico. Moreover, the record indicated the effectiveness of the checkpoint based upon the rate of apprehension.*

*"During an eight-day period in 1974, . . . roughly 146,000 vehicles passed through the checkpoint during 124 1/6 hours of operation. Of these, 820 vehicles were referred to the secondary inspection area, where Border Patrol agents found 725 deportable aliens in 171 vehicles." 428

U.S. at 554, 96 S.Ct. at 3081. Therefore, 21% of the vehicles contained illegal aliens.

Recognizing the necessity and effectiveness of these operations, the Court noted that the "substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints . . . ." 428 U.S. at 556, 97 S.Ct. at 3082. The Court balanced this interest against the limited intrusion (defined as the "stop itself, the questioning, and the visual inspection") upon a motorist's right to free passage. The objective intrusion was deemed equivalent to that experienced in Brignoni-Ponce, but "checkpoint stops [are viewed] in a different light because the subjec-

tive intrusion - the generating of concern or even fright on the part of lawful travelers - is appreciably less in the case of a checkpoint stop." 428 U.S. at 558, 96 S.Ct. at 3083.**

**In Prouse, the Court noted that the "crucial" distinction" between Martinez-Fuerte and Brignoni-Ponce, was the "lesser [subjective] intrusion upon the motorist's Fourth Amendment interests." 440 U.S. at 656, 99 S.Ct. at 1397.

Moreover, a permanent checkpoint reduced the degree of interference with the legitimate traffic, a distinction which separated this case from Brignoni-Ponce: "Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and wil not be stopped

elsewhere." 428 U.S. at 559, 96 S.Ct. at 3083. The Court concluded that "the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us." 428 U.S. at 562, 96 S.Ct. at 3085. However, Justice Powell made clear the limited nature of the decision: "Our holding today, approving routine stops for brief questioning . . . is confined to permanent checkpoints. We understand, of course, that neither longstanding congressional authorization nor widely prevailing practices justify a constitutional violation." 428 U.S. at 566 n. 19, 96 S.Ct. at 3087 n. 19.

C. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

A county patrolman stopped Prouse's car to check his license and registration without having observed traffic or equipment violations or any suspicious activity. The Court held that the Fourth Amendment requires at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that he is violating some other law.

Though accepting as "vital" the State's interest in promoting highway safety by apprehending unlicensed drivers, unregistered or stolen vehicles, and drug or alcohol intoxicated drivers, the Court said:

> The question remains, however, whether in the service of these discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interst which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.

440 U.S. at 659, 99 S.Ct. at 1399.

The Court concluded that the

marginal contribution to roadway safety from spot checks did not justify subjecting the lawful motorist to this seizure:

> By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations or other articulable basis amounting to reasonable suspicion that the driver is unlicense or his vehicle unregistered - we cannot conceive of any legitimate basis upon which a patrolman could decide that

> stopping a particular driver for a spot check would be more productive than stopping any other driver.

440 U.S. at 661, 99 S.Ct. at 1400 (emphasis added).

D. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

Police on patrol noticed appellant walking in an alley located in an area with a high incidence of drug traffic. They stopped him and asked that he provide identification and explain what he was doing. The Court found that "[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest, and appellant's right to personal security and privacy tilts in favor of freedom from police

interference." 443 U.S. at 52, 99 S.Ct. at 2641. The Court noted that the State's interest, the prevention of crime, was a "weighty social objective," but, "even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." Id.

II. Principles for Determining Whether a Search is Reasonable

When the police stop motorists at a roadblock to check their license or registration and for any signs of intoxication, a "seizure" subject to the requirements of the Fourth

Amendment occurs. The salient inquiry is the reasonableness of this seizure. The purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The reasonableness of the seizure is judged by balancing the intrusion on individual liberty against its promotion of legitimate governmental interests. This standard requires, at a minimum, that the facts which support an intrusion are capable of measurement against an objective standard, whether this be probable cause or a less stringent test. Prouse, 440 U.S. at 653, 654, 99 S.Ct. at 1395, 1396.

To determine whether the Fourth Amendment will tolerate seizure in the absence of articulable suspicion or probable cause, American courts engage in a balancing of several considerations: (1) the gravity of the public concern served by the seizure, (2) The severity of interference with individual liberty, and (3) the degree to which the seizure advances the public interest. Brown, 443 U.S. at 50, 51, 99 S.Ct. at 2640, 2641.

A. Gravity of Public Interest

In the cases noted above, only one seizure involved a public interest of sufficient gravity to justify dispensing with reasonable suspicion.

In Martinez-Fuerte, the Court found that the substantial national interest in the effective control of aliens illegally crossing the Mexico-United States border outweighed the limited intrusion on the right to free travel; it cited language in Carroll v. U.S., 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543, 551 (1925), distinguishing seizures of American motorists from those whose objective was "national self-protection."

None of the public interests advanced in the other cases proved adequate to justify a stop on less than reasonable suspicion: Brignoni-Ponce (the "valid" interest in economic and social problems created by

illegal immigration), Prouse (the "legitimate" interest in promoting safety on the highways), and Brown (crime prevention, a "weighty" social objective). In these cases, the interference with the lawful motoring public and the tendency of the designated problem to generate articulable grounds for identifying violators were the crucial criteria which convinced the Court that reasonable suspicion must be demonstrated.

B. Severity of the Interference

The intrusions involved in most of these cases, a momentary stop and brief questioning, can be objectively regarded as modest. However, even the most limited seizure is

"constitutionally cognizable." Prouse, 440 U.S. at 661, 99 S.Ct. at 1400. Even though the stop in Brignoni-Ponce was similar to the one in Martinez-Fuerte, the Court found that the permanent checkpoint in the latter case was likely to be regarded by motorists as less intrusive. Roving patrols frequently operate at night, and their approach may frighten motorists, noted Justice Powell. However, the subjective intrusion at permanent checkpoints is minimal because motorists can see other vehicles stopped and visible signs of officers' authority. Martinez-Fuerte, 428 U.S. at 558, 96 S.Ct. at 3083.

As for the degree of interference

imposed upon the lawful motoring public, the Brignoni-Ponce Court found that dispensing with reasonable suspicion would subject every resident to "potentially unlimited interference with their use of the highways . . . ." 422 U.S. at 882, 95 S.Ct. at 2581. However, the Martinez-Fuerte Court found that the permanent checkpoint did not intrude similarly on lawful motorists because they ". . . know or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere," and the checkpoints involve less discretionary enforcement. 428 U.S. at 559, 96 S.Ct. at 3083.

C. Degree to which Seizure Advances Interest

A seizure is not reasonable unless it is well calculated to effec-

tuate its purpose. Moreover, to justify a seizure on less than articulable suspicion or probable cause, the government must demonstrate that the method chosen is necessary and effective, and more effective than alternative mechanisms.

In Martinez-Fuerte, substantial evidence demonstrated the checkpoint's effectiveness in detecting illegal aliens. The requirement of reasonable suspicion was impractical because the heavy flow of traffic (1,176 cars per hour) precluded the ". . . particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." 428 U.S. at 557, 96 S.Ct. at 3083.

The record substantiated the effectiveness of the checkpoint and it appeared that the law enforcement need in question "could be met without reliance on routine checkpoint stops." 428 U.S. at 556-557 n. 12, 96 S.Ct. at 3082 n. 12.

The necessity for even a minimal degree of interference had not been demonstrated in Prouse and Brown. In Prouse, the Court recognized that keeping dangerous automobiles and drunk drivers off the highway was a legitimate public interest, but concluded that roving patrols were not a sufficiently productive mechanism because of their incremental contribution to highway safety. The low pro-

ductivity of the roving patrol stop was similarly cited in Brown, 443 U.S. at 52, 99 S.Ct. at 2641.

Finally, I think the Court has made it clear that when a given crime is one which can be frequently detected through observation (like driving offenses), it is unlikely that stops on less than reasonable suspicion are constitutional. Brignoni-Ponce, 422 U.S. at 882, 883 n. 8, 95 S.Ct. at 2581 n. 8; Prouse, 440 U.S. at 659, 99 S.Ct. at 1399.

III. This Roadblock Fails Under the Case Law

In Prouse, Justice White wrote for the Court:

> . . . except in those situations in which there is at least articulable and reasonable

suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

440 U.S. at 663, 99 S.Ct. at 1401 (emphasis added).

The majority cites this dictum as one basis for affirming the constitutionality of the roadblock in this case. Dissenting in Prouse, Justice Rehnquist noted the peculiar dichotomy in requiring reasonable suspicion to stop an individual motorist while dispensing with that standard when the motoring public is seized en masse:

> Because motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop all motorists on a particular thoroughfare, but he cannot without articulable

> suspicion stop less than all motorists. The Court thus elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence. The role becomes 'curiouser and curiouser' as one attempts to follow the Court's explanation for it. . . . Indeed, the Court does not say that these interests can never be infringed by the State, just that the State must infringe them en masse rather than citizen by citizen. To comply with the Fourth Amendment, the State need only subject all citizens to the same 'anxiety' and 'inconvenien[ce]' to which it now subjects only a few.

440 U.S. at 664, 666, 99 S.Ct. at 1401, 1403.

Justice Rehnquist argued in Prouse that reasonable suspicion

should not be required for a spot check because "[t]he whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed . . . [rather than when] the wreckage is being towed away." 440 U.S. at 666, 99 S.Ct. at 1402.

The Prouse reed upon which this Court leans must be construed within its context. Justice White analyzed the seizure in Prouse by comparing Brignoni-Ponce and Martinez-Fuerte. His suggestion that "questioning of all oncoming traffic at roadblock-type stops is one possible alternative" calls to mind the earlier approval in

Martinez of a permanent roadblock in which did not present any subjective intrusion on lawful motorists and which effectively achieved its national security ends. However, there are several bases upon which the constitutionality of the Martinez-Fuerte roadblock may be distinguished from the roadblock in the case at bar.

Among the distinguishing factors is the gravity of the public interest. Control of our borders has traditionally been regarded as justifying severe measures. Foreigners who visit or immigrate to this country are subjected to search and seizure when they pass through the ports of entry. The

need to manage the influx of immigrants and control the potential for the spread of contagious disease has been said to justify arbitrary steps. Carroll v. United States, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed.2d 543 (1925). The carnage caused by drunk drivers needs no documentation and has been acknowledged by this Court and the U. S. Supreme Court as a compelling interest.*** However, if controlling this offense is to be equated with national security, it seems likely tnat most felonies could be fairly declared grave national problems.

***South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); Ruge v. Kovach (1984), Ind., 467 N.E.2d 673.

The permanent nature of the Martinez checkpoint was deemed important because it reduced the subjective intrusion on lawful motoring. In contrast, the roadblock currently under consideration gave an approaching motorist no forewarning until 2/10 to 4/10 of a mile preceding the roadblock. At that point, the approaching motorist could perhaps see the congestion ahead, but had no notice that the congestion represented a duly authorized roadblock.

Moreover, there was a basis in evidence upon which the Court concluded in Martinez-Fuerte that alternative mechanisms to promote the same ends which would be less intru-

sive and reasonably effective were not available. There is no determination of relative effectiveness in the instant case. Indeed, there is little to assess the actual effectiveness of the roadblock. While the majority states flatly that "[a]pproximately seven (7%) percent of the drivers checked that specific evening were intoxicated," the reality of the record is that there is no substantial basis for saying so.****

****The supervisor of the roadblock testified that he did not know how many cars were stopped altogether, but thought it was "a hundred and some." Asked how many people were jailed, he said he did not know. Asked if it was as many as twenty, he said: "Oh, no, it was people that went to jail was like six or seven." There is nothing to indicate how many individuals were arrested for each offense which formed the purpose of the roadblock. This information constitutes the only information in the record on effectiveness.

Finally, when the nature of the prohibited conduct was subject to observable, articulable grounds for identifying violators, the Brignoni-Ponce and Prouse Courts accorded this factor substantial weight. Appellee Garcia, of course, was charged with a crime that is commonly observable.

IV. Roadblock Procedures

If, as this Court announces, "the procedure used in the roadblock in the immediate case is a good example of constitutionally valid roadblock operation," it is important to identify the specific procedures which the majority deems to be adequate under the Fourth Amendment. All the federal

cases cited above are helpful in outlining practices which might comply with the Fourth Amendment. As the only case holding a seizure constitutional, Martinez is the most useful an defining appropriate procedures:

> (1) Advance warning of roadblock. In Martinez-Fuerte, approaching motorists were notified, by a sign with flashing lights, one mile preceding the roadblock, that all vehicles must stop in one mile. Another sign warned motorists at 3/4 mile preceding the roadblock to "WATCH FOR BRAKE LIGHTS." At the checkpoint, there were two large signs with flashing lights, "STOP HERE, U.S. OFFICERS." Martinez-Fuerte, 428 U.S. at 545, 546, 96 S.Ct. at 3077.

(2) Safety considerations. The checkpoint was situated on flat terrain where there was a permanent building and floodlights. Martinez-Fuerte, 428 U.S. at 546, 96 S.Ct. at 3077.

(3) Seizure. All vehicles***** were brought to a "virtual, if not complete, halt" and were screened by the Border Patrol agents. Martinez-Fuerte, 428 U.S. at 546, 96 S.Ct. at 3078.

*****The Prouse Court concluded that the spot check was analagous to the roving patrol rather than the permanent checkpoint. The Court noted that "[f]or Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual

vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community." Prouse, 440 U.S. at 657, 99 S.Ct. at 1398 (emphasis added).

(4) Minimal interference with lawful traffic. The public had knowledge of the exact location of the checkpoint and knew they would not be stopped elsewhere and could avoid the roadblock. There was no discretionary enforcement because only cars passing through the checkpoint could be stopped. Martinez-Fuerte, 428 U.S. at 559, 96

S.Ct. at 3083.

(5) Location based upon effectiveness. The location of the checkpoint was made by "officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources," not the field officers. Moreover, the location was a reasonable decision based upon criteria designed to ensure effectiveness: avoid interference with traffic in populated areas near border, close to significant roads leading away from border, situated in terrain that restricts vehicle passage around checkpoint, on a stretch of highway compatible with safe operation, and beyond zone where border passes are valid.

Martinez-Fuerte, 428 U.S. at 553, 559, 96 S.Ct. at 3080, 3083.

(6) Discretion limited. A seizure not based upon reasonable suspicion should be "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown, 443 U.S. at 51 [99 S.Ct. at 2640]. Standards, guidelines, or procedures promulgated by either his department or the state attorney general would assure proper action. Prouse, 440 U.S. at 650 [99 S.Ct. at 1394). The stop and inquiry must be reasonably related in scope to the justification for their initiation. Brignoni-Ponce, 422 U.S. at 881 [95 S.Ct. at 2580].

A thorough examination of the record indicates that the roadblock procedures used in this case, which the Court holds to be constitutional, are:

> (1) Knowledge of roadblock location. The State police released prior publicity through the newspapers of the plan to conduct roadblocks, but did not indicate particular locations.
>
> (2) Selection of location. Several possible roadblock locations were selected by a sergeant who supervises the State Police troopers in Hendricks County. He then conferred with a lieutenant and another officer of the Hendricks County sheriff's department and the participating field officers; a joint

decision was made on the roadblock location. They chose this location "because it was on print outs that our department has, it shows that the road generates a lot of driving accidents involving alcohol percentage wise on the road." None of this data is part of the record. As noted above, the effectiveness of this roadblock in detecting drunk drivers is essentially unknown.

(3) Guidelines. The sergeant who was ordered to do the roadblock received "nothing in writing" about methodology. He did have "some information from Marion County and Morgan County. Guidelines they had set down." The record does not contain any written plan or indicate

what the supervisor on site conveyed to those working the roadblock. "Basically, it is just common sense about the way you do things," he testified.

(4) Roadblock operation. Westbound traffic on U.S. 40 was stopped by 11 uniformed officers. The left lane was funnelled into the right westbound lane using flares and the red flashing lights of two police cars; one car parked in the passing lane and the second car parked on the shoulder. A State Police sergeant was in charge of the participating State Police and a lieutenant with the sheriff's department supervised the county officers. Cars were stopped in groups of five,

while the officers were investigating one group the remaining traffic passed through the roadblock without questioning, then another group of five would be questioned after the officers had finished with the preceding group.

******

If a person was suspected of drunk driving then the driver would be further detained at a secondary location adjacent to the roadblock.

******After a group of cars had been stopped and investigated, then the police "would go back out to the roadway and when we was prepared, stop the next five cars . . ." Record at 100. The supervising officer of the State Police testified at the suppression hearing

that "a lot depended on the luck of the draw whether or not you were stopped that night" and that defendant "was one of the unlucky five who were pulled over." Record at 115, 126. The supervisor also testified that no one was preempted from the detention: "There have been police officers and firemen that have come through that have been stopped. Easily, they pull in there where the police cars are parked to find out what is going on." Record at 101.

(5) Safety considerations. Approaching motorists were not warned that a roadblock was ahead. Moreover, an approaching motorist would not see the flares until he was within

two to four tenths
of a mile.

It is reasonably easy to see how these procedures fall short under Supreme Court case law. First, while the general public who read the newspaper accounts of the intended roadblocks may have been forewarned, approaching motorists did not have notice of the impending congestion until they were 2/10 to 4/10 of a mile away. The State Police sergeant testified that motorists might have assumed the congestion was an accident. Indeed, there is no indication in the record that detained motorists were advised of the roadblock's purpose. This absence of notice not only affects safety, but also increases the

subjective intrusion experienced by the public. Public safety was also implicated by the decision to locate the roadblock at a spot where curves in the road before it and after it limited visibility.

Second, allowing field officers to decide where to stop motorists raises the risk of arbitrary or oppressive action. A sergeant of the State Police assigned to the county along with Sheriff's officers and field deputies determined the location. A commander responsible for making decisions based upon the "most effective allocation of limited enforcement resources" was not involved.

Third, the location decision

shoud be based on empirical data designed to ensure effectiveness. In this case, the record does not include the data upon which the decision was made. This Court's approval of a decision for which there is no evidence in the record is tantamount to declaring that the unsubstantiated conclusions of the field officers are adequate under the Fourth Amendment. This is clearly not so. While the rate of apprehension is one measure of effectiveness of the mechanism used, there is nothing substantial in the record to indicate the apprehension rate for this roadblock. As for its effectiveness compared to other methods, we have no evidence at all.

Finally, the participating officers should act pursuant to guidelines. In this case, not even the supervising officer received any written guidelines from his superiors. While "common sense" is an excellent prescription, it does not provide any basis upon which this Court can determine whether the decisions were indeed neutral and explicit. In effect, the field officers' discretion was unlimited. Among the neutral criteria for selecting vehicles, according to the testimony, was "luck."

The majority indicates that State v. McLaughlin (1984), Ind. App., 471 N.E.2d 1125, is overruled to the extent it conflicts with this deci-

sion. The Court of Appeals held the roadblock in McLaughlin unconstitutional. The operation and procedure of the McLaughlin roadblock is as follows:

> (1) Roadblock location. The roadblock was held on a flat stretch of straight road. An Indiana State Police squad sergeant decided the location of the roadblock based upon his knowledge and experience as a State Police officer and consideration of "studies" which were "an accumulation of accidents that have occurred maybe on that road over a given period of time, which could be a year." However, the sergeant did not know the base years of the study, the number of accidents

or their nature; he was aware of one multiple fatality which was an alcohol-related accident during the preceding two years. McLaughlin, 471 N.E.2d at 1137, 1139.

(2) Knowledge of roadblock. There were flares and police cars with flashing red lights located one-quarter mile ahead of the roadblock. There was no warning sign or notice why vehicles were being stopped. Moreover, the record indicated that the public did not have advance notice of this roadblock or of the decision to establish roadblocks in the area. McLaughlin, 471 N.E.2d at 1138-39.

(3) Roadblock procedure. Every car was stopped.

(4) Discretion authorized by officers. The squad sergeant had "complete discretion to decide the location, duration and frequency of the roadblocks." McLaughlin, 471 N.E.2d at 1140. The actual conduct of the roadblock (which cars to stop, how to conduct the questioning of drivers, and how to handle those suspected of violating the law) was prescribed by Marion County prosecutor's office guidelines. These guidelines were given to the squad sergeant. A participating field officer testified that he had not read these guidelines prior to his participation in the roadblock, but rather acted upon the squad sergeant's oral instruction.

Reading McLaughlin as "good law" only to the extent it conforms to today's decision helps clarify what the majority regards as a permissible seizure under the Fourth Amendment. A roadblock need not stop all vehicles (McLaughlin), only some, and the detainees may be chosen at random (Garcia). The seizure may be supervised bya field officer with rank. He may do so without any written, reviewable plan. The decision to stop motorists at a given location may be shared by individual troopers and ranking officers (in today's case) rather that by a single ranking State Police Officer (McLaughlin). Furthermore, the decision to locate a

roadblock at a given place is apparently not reviewable by the judiciary. In the case at bar, the location was based generally upon accident data collected by the State Police, but there is no specific information which served as the basis for this decision. In McLaughlin, the decision was based upona squad sergeant's own experience and knowledge, and unidentified "studies."

Reading today's decision and what remains of McLaughlin, it appears that roadblocks are constitutional under a Gresham's Law theory of the Fourth Amendment.

1. Roadblocks may be used to find perpetrators of any crime deemed

grave by society.

2. The Fourth Amendment rule of probable cause or articulable suspicion may be suspended without any demonstration that the roadblock is more effective than traditional methods of apprehending such offenders.

3. Roadblocks may be carried out according to any plan field officers regard as reasonable and the plan need not be available for judicial review.

4. The decision about location of the roadblock may be made by field officers and it is not necessary to establish why a given site was chosen by providing reviewable evidence.

5. Decisions about where to

locate the roadblock and who to stop may be made by field officers. It is not necessary that anyone in the headquarters command structure take part.

I submit that a roadblock carried out under these conditions cannot be distinguished from virtually any random stop made by law enforcement officers searching for various types of felons.

Among our duties is to articulate the constitutional principles which separate America as a free society from those which are not so free. It is "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60

(1803). I dissent today largely because what the Court says about the Fourth Amendment is too little.

Lastly, while the Court has rejected Garcia's Fourth Amendment claim, it has not so much as mentioned, much less purported to decide, the rights assured under Art. I, §11 of the Indiana Constitution. I take it that question is to be decided another day.

DeBRULER, J., joins in this dissent.

APPENDIX "B"

STATE OF INDIANA)
) SS:
COUNTY OF HENDRICKS)

HENDRICKS SUPERIOR COURT NO. 2

CAUSE NO. 2SCR84-83/HCR84-821

STATE OF INDIANA)
)
vs.)
)
RAY A. GARCIA)

FINDINGS OF FACT AND ORDER

This matter comes before the Court upon the Defendant's Motion to Suppress with his Memorandum in support thereof; and the Defendant appearing in person and by his counsel, Michael F. Singer, and the State of Indiana appearing by its Prosecuting Attorney, David H.

Coleman; and the Court being duly advised, by witnesses seen and heard, evidence presented and the arguments of the respective attorneys herein now make the following Findings and Order thereon:

FINDINGS

1. That on the evening of June 22, 1984, Officers of the Indiana State Police in conjunction with the Hendricks County Sheriff's Department set up and operated a traffic check roadblock on Highway U.S. 40 approximately fifty (50) yards east of Six Points Road, Hendricks County, Indiana.

2. That this location selected at the local level earlier that

evening was designed and operated for the express purpose of identifying and apprehending intoxicated drivers by randomly stopping westward bound traffic, five (5) vehicles at a time.

3. That the location of the roadblock was in a four (4) lane dimly lighted area, of high traffic volume west of, and in close proximity to, a drinking establishment beyond an elongated curve.

4. That the location of the roadblock site and area is a high accident area where a police officer investigating a traffic accident had been previously struck and injured.

5. That motorists approaching the roadblock area were given no

advance warning as to the existence, nature or extent of the impending roadblock nor was any type flood lighting utilized at the roadblock site.

6. That the roadblock location included a relatively small shoulder area of approximately six (6) feet in width, was in general disrepair and bordered upon an open ditch, was lacking any basic safety devices to include guardrails, adequate lighting or median strips.

7. That the roadblock location was unreasonable and ill-suited for use in that it subjected individual motorists to undue risk of injury, surprise and anxiety.

8. That there was no previous publication of this roadblock to the general public.

9. That motorists were flagged to one (1) lane of traffic by an individual uniformed police officer standing in the roadway, utilizing a red fusee and although there were approximately eleven (11) to fifteen (15) officers at the location, only two (2) police cars with flashing red lights were parked near or on the roadway.

10. That the Defendant's vehicle was initially stopped pursuant to this roadblock and directed on to the shoulder area of the highway and subsequently directed to an adjacent

parking lot.

11. That the participating law enforcement officers were not given any specific written guidelines upon which to govern their actions at the roadblock location.

12. That the supervising roadblock police officer acted as participant rather than in supervisory capacity.

13. That the Defendant was detained pursuant to the roadblock procedure and was not observed or suspected to be in violation of any statute or ordinance nor was there anything extraordinary about the Defendant's vehicle, demeanor or physical characteristics.

14. That the Defendant's detention was not based upon any reasonable individualized suspicion or other articulable reason, but only upon the Defendant's being in that location at that particular time.

15. That every motorist is entitled to a reasonable expectation of privacy and unfettered travel as guaranteed by the Fourth Amendment to the United States Constitution and Article II, §11 of the Constitution of the State of Indiana.

16. That a roadblock detention constitutes a seizure within the meaning of both the Fourth Amendment to the United States Constitution and Article I, §11 of the Constitution of

the State of Indiana.

17. That the law enforcement officers involved in this random roadblock have received training in identifying and apprehending drunken drivers by observation techniques.

18. That roadblocks to detect drinking drivers represent a major intrusion upon the individuals and there is no evidence presented indicating the superiority of the random roadblock technique over more conventional less intrusive methods of identification and apprehension.

19. That the State of Indiana has a clear and important interest in identifying and apprehending drunken drivers.

20. That although individual police officers had little discretion in which vehicles stop, the police officers were given unbridled discretion as to the disposition of each driver and were not issued specific written guideline upon which to govern their actions.

21. That the use of a random roadblock to detect and apprehend the Defendant herein is an unreasonable intrusion upon those rights guaranteed to the Defendant by the Fourth Amendment and Article II, §3 of the Indiana Constitution.

22. That the use of a random roadblock to detect and apprehend an individual driver is per se contrary

to the guarantees of the Fourth Amendment and Article II, §3 of the Constitution of Indiana and are, therefore, per se, unconstitutional.

CONCLUSIONS AND ORDER

The Defendant's Motion to Suppress focuses upon the constitutional propriety of a random roadblock to detect and apprehend an intoxicated driver.

Specifically, he contends that his detention and subsequent arrest pursuant to a random roadblock stop without individualized suspicion, articulable facts or other probable cause are violative of his constitutional rights. These rights being expressly guaranteed by the Fourth

Amendment of the United States Constitution and the parallel provision of Article I, §3 of the Constitution of the State of Indiana.

The facts presented before this Court by both the State of Indiana and the Defendant are virtually without controversy.

The State's evidence showed that the Defendant was not observed in the commission of any crime, traffic violation or believed to be subject to arrest at the time of his detention. In short, the Defendant's detention was without a probable cause.

The State has correctly and without opposition argued that it has a fundamental and important interest

in detecting and apprehending drunken drivers.

Likewise, the Defendant correctly and succinctly argues that he, as an individual, has a basic and fundamental right to privacy and reasonably unfettered travel upon the State's highway.

Further, these rights are guaranteed by the express provisions of both the Fourth Amendment of the United States Constitution and the parallel provisions of Article I, §3 of the Indiana State Constitution.

It is well recognized that whenever a police officer restrains an individual, the officer has seized that individual and the Fourth

Amendment and corresponding Indiana Constitutional provisions and proscriptions are operative.

Clearly, roadblock detention constitutes a seizure within the meaning of the Fourth Amendment and Indiana Constitution.

To resolve these competing interests, this Court is obligated to balance the interest of the State as against the intrusion upon the rights of the Defendant.

The essential purposes of the Constitutional provisions and the exclusionary rules are to impose a standard of reasonableness upon the discretion of the police officers in order to safeguard the privacy and

security of the individual against arbitrary invasions.

As this case is a case of first impression in this Court, reliance upon the various State and Federal cases previously cited by the State and Defendant as precedents is necessary to adequately balance these interests. Therefore, three (3) considerations enumerated by the Supreme Court in Brown v. Texas, 443, U.S. 47 (1979) are of great importance.

These considerations are the:

1. Gravity of public concern served by the seizure

2. The degree to which the seizure advances the public interest

3. The extent to which the seizures

interfere with
individual liberty.

Examining the first consideration, no logical argument can be made to minimize the danger presented to the public by an intoxicated driver. Nationwide, this problem is being discussed and dealt with in a variety of ways and locally, this Court has been in the forefront in efforts to curtail this pervasive problem. The usual method of coping with the situation has been by intensified law enforcement training and patrols.

The training and patrol effort of police agencies has focused upon observation of the individual motorist. It is without controversy

that an intoxicated motorist can be detected by a trained officer on the basis of the motorist's behavior. Erratic driving, speeding, exceptionally slow driving are all indications of a possible intoxicated driver. These indications are easily observed and do not require subjecting all citizens to stop at a roadblock.

In regard to the second consideration, the State has failed to show any evidence demonstrating the superiority of a roadblock over more conventional, less intrusive methods of detection, apprehension or deterrence.

Quite to the contrary, the State's witnesses were unable to state

what advantage, if any, this technique improved their enforcement efforts. Furthermore, the State's witnesses were unable to provide evidence required to access the superiority of a roadblock against more conventional means of apprehending intoxicated motorists.

The record is void of any evidence showing that the effectiveness and productivity of the roadblock outweigh the public's convenience and right to privacy.

The decision to conduct this roadblock was made at a local level, by and through supervisory personnel who were actively participating in the roadblock rather than supervising it.

Other officers involved in the roadblock were not given written guidelines to govern their actions. The location utilized in this roadblock also represents a major and unreasonable intrusion upon the individual.

There is no doubt that the seizures in a roadblock setting interfere to a great extent with individual liberty and the third factor of Brown v. Texas (supra) is manifest in both the location and operation of the block which is the subject of this proceeding.

The location of this roadblock placed the officers and the unwary motorist at risk of serious injury.

At the least, the roadblock would generate surprise and anxiety to the individual.

The location and operation of the roadblock is inconsistent with the State's position for the necessity to protect the public or promote highway safety and cannot be justified under any of the cases cited by the State or Defendant.

In conclusion, this Court is not persuaded as to the necessity of the roadblock as an effective law enforcement tool. The roadblock represents a technique of speculative value which represents a significant and unwarranted intrusion of an individual's security and rights.

In the adjoining State of Illinois, even a properly-controlled search might not be permissible. In People v. Bartley, No. 3-83-0573, __ N.E.2d __, Ill. App. 3d Dist. (June 29, 1984) held that roadblocks are per se Fourth Amendment violations.

Therefore, it is the opinion of this Court that not only this, but possibly all roadblock traffic checks established and operated for the purpose of detecting and apprehending an intoxicated driver are, per se, violative of Article I, §3 of the Indiana Constitution and the Fourth Amendment of the United States Constitution. It is, therefore, the Order of this Court, that the Defendant's Motion to

Suppress should be and is hereby sustained and the evidence suppressed.

SO ORDERED and DATED, this 1st day of November, 1984, at Danville, Indiana.

S/John C. Mowrer,
JUDGE, Hendricks
Superior Court No. 2

APPENDIX "C"

IN THE

SUPREME COURT OF INDIANA

NO. 32S01-8611-CR-987

STATE OF INDIANA)
)
v.)
)
RAY A. GARCIA)

No. 1-385 A 65

in the

Court of Appeals

NOTICE OF APPEAL

Comes now Appellee, by counsel, and notifies the Court of its intention to petition the Supreme Court of the United States for a Writ of Certiorari. Further, Appellee would request the Clerk of the Court to certify and transmit the record herein to

the Supreme Court of the United States.

Respectfully submitted,

Alex R. Voils, Jr.
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served upon the Attorney General's Office, 219 State House, Indianapolis, IN 46204, by hand-delivery, this 15th day of December, 1986.

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Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1229

RAY A. GARCIA,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of determining if the operator is properly licensed, legally intoxicated, or driving a licensed vehicle, where there is neither probable cause nor reasonable suspicion that the vehicle is being driven contrary to the laws governing the operation of motor vehicles.

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IN THE

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OCTOBER TERM, 1986

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STATE OF INDIANA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, the State of Indiana, respectfully requests that the Court deny the petition for a writ of certiorari which seeks review of an opinion of the Supreme Court of Indiana since a substantial federal question has not been raised.

OPINION BELOW

The Supreme Court of Indiana entered an opinion in this cause on November 21, 1986. The opinion is set forth in the Petitioner's Appendix at A-1 and is officially reported at 500 N.E.2d 158.

STATEMENT OF THE CASE

In conjunction with a state-wide program and in cooperation with the Hendricks County Sheriff's Department, the Indiana State Police conducted a roadblock on U.S. 40, two and one-half miles east of the town of Plainfield in Hendricks County. The purpose of the roadblock was to check for improperly licensed drivers, improperly registered automobiles, underage drinking, and persons driving while intoxicated. Prior to the roadblock, the State Police publicized, in various newspapers, the general plan to conduct roadblocks but did not specify the location of the roadblocks.

The particular location of the roadblock at issue was selected by Officer James Cramer, Supervisor of the Indiana State Police in Hendricks County, and Officer Daniel Williams of the Hendricks County Sheriff's Department. The officers' decision was based upon information, obtained from State Police records, which disclosed that the particular location generated numerous fatal and nonfatal accidents involving alcohol. In addition, the roadblock was implemented in accordance with a plan that had been previously devised by Marion County and Morgan County Police Departments and which was later adopted by the State Police. Recent United States Supreme Court roadblock decisions guided the development of the plan.

According to the plan, westbound traffic on U.S. 40 was stopped by approximately eleven uniformed officers who were visible on the highway. These officers blocked off the left westbound lane and all traffic was funneled into the right westbound lane by means of flares and the lights from police cars.[1] Nonselectively, cars were stopped in consecutive groups of five.[2] Absent the detection of drinking or other violations, drivers were detained for no more than two or three minutes during which time other traffic was permitted to pass. After a group of

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[1] In addition, the roadblock area was well-lighted. Indeed, numerous motorists, upon sighting the roadblock, reversed their direction and fled.

[2] The officers had absolutely no discretion to depart from this procedure.

five vehicles had been inspected and released, the next group of five cars traveling west was detained and the procedure was repeated.

Upon the discovery of an operating violation or the detention of alcohol consumption, the driver was instructed to drive into a nearby parking lot. A driver suspected of alcohol consumption was given a field blood alcohol test. Any driver whose blood alcohol content was over the presumptive limit of .10 was transported to the Hendricks County jail where a breathalyzer test was administered. If the driver failed the breathalyzer test, he or she was arrested.

The Petitioner, Ray Garcia, who exhibited no erratic or suspicious driving, was among the first group of five cars stopped. When the Petitioner was unable to produce an operator's license, an officer who recognized the Petitioner stated that the Petitioner's license had been suspended. After detecting the odor of alcohol, the officer read to the Petitioner an implied consent statement. Subsequently, the Petitioner agreed to take a field sobriety test which he failed. Upon his failure of a breathalyzer test, the Petitioner was arrested. The Petitioner was charged with his second offense of driving while intoxicated.[3]

Prior to trial, the Petitioner filed a motion to suppress the evidence of driving while intoxicated which was obtained at the roadblock. The trial court granted the motion. The State appealed the ruling to the Court of Appeals of Indiana. The Court of Appeals reversed the ruling of the trial court and stated that the roadblock procedures employed were constitutionally sound.[4] Thereafter, the Petitioner filed a petition for rehearing which was denied by the Court of Appeals.[5] Subse-

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[3] The roadblock continued for two hours. During this time, approximately 100 cars were stopped, 20 citations were issued, and seven persons were arrested for driving while intoxicated.

[4] The decision of the Court of Appeals is officially reported at 481 N.E.2d 148.

[5] The Court of Appeals' decision to deny the petition for rehearing is officially reported at 489 N.E.2d 168.

quently, the Petitioner filed a petition for transfer which was granted by the Supreme Court of Indiana. The Supreme Court of Indiana affirmed the decision of the Court of Appeals.[6]

REASONS FOR DENYING THE WRIT

I.
SINCE THE JUDGMENT OF THE INDIANA SUPREME COURT IS NOT A FINAL JUDGMENT, THE WRIT MUST BE DISMISSED

The jurisdiction of the Supreme Court to review a decision of a state court is codified in 28 U.S.C. § 1257. The first jurisdictional predicate of § 1257 is that there be a final judgment or decree rendered by "the highest court of a State in which a decision could be had." The final judgment must reflect a substantial federal question that has been properly raised and necessarily decided in the state court proceedings. Generally, a state court judgment must be final in two respects: "[i]t must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Ry. Co. v. Railroad Comm.*, 324 U.S. 548, 551, 65 S.Ct. 770, 772-773 (1945).[7] The finality requirement of § 1257 serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions, *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67, 68 S.Ct. 972, 976 (1948); (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Article III; and (3) it limits federal

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[6] The Supreme Court's decision which affirmed the ruling of the Court of Appeals is officially reported at 500 N.E.2d 158.

[7] Under the most basic traditional definition, a final judgment is one that:

> [T]erminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered . . . nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered . . . nothing is left to the judicial discretion of the court below.

Mowrer v. Fletcher, 114 U.S. 127, 128, 5 S.Ct. 799, 800 (1885).

review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-124, 65 S.Ct. 1475, 1477-1478 (1945).

In criminal proceedings, the final judgment is the sentence. *Parr v. United States*, 351 U.S. 513, 518, 76 S.Ct. 912, 916 (1956); *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S.Ct. 1958, 1959 (1981). In prior cases, the Supreme Court ruled that a state court judgment which merely denies a motion to dismiss an indictment or disposes of a motion relating to the admission of evidence lacks the finality necessary to support review by the Supreme Court. *See Chapman v. California*, 405 U.S. 1020, 92 S.Ct. 1284 (1972). Nevertheless, the Supreme Court has departed from this traditional view. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S.Ct. 1029, 1037 (1975), the Supreme Court identified four categories of cases where a decision of the highest state court will be treated as final even though further proceedings are anticipated in the lower state courts.[8]

Several recent decisions in which certiorari was granted by the Supreme Court involved a motion to suppress. In *Michigan v. Clifford*, _____ U.S. _____, 104 S.Ct. 641 (1984), the defendants were charged with arson. Prior to trial, the defendants moved to suppress certain physical evidence which was obtained by means of a warrantless and non-consensual search

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[8] The four categories enumerated in *Cox* are as follows: (1) cases in which there are further proceedings — even entire trials — yet to occur in the state courts, but the federal issue is conclusive or the outcome of further proceedings is preordained; (2) cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings; (3) cases where the federal claim has been finally decided, with further proceedings on the merits in the state courts to follow, but in which later review of the federal issue cannot be had whatever the outcome of the case; and finally (4) cases where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits or nonfederal grounds, thus rendering unnecessary review of the federal issue by the Supreme Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

of the defendants' home. Following a hearing, the trial court denied the motion. The trial court certified its evidentiary ruling for interlocutory appeal and the Michigan Court of Appeals reversed. Certiorari was subsequently granted. In *New York v. Quarles*, _____ U.S. _____, 104 S.Ct. 2626 (1984), a police officer detained the defendant since he matched the description of an assailant in possession of a gun. The defendant advised the officer where he had hid the gun. The officer retrieved the gun, arrested the defendant, and read the *Miranda* warnings to him. The defendant admitted to the officer that he owned the gun. Prior to trial, the trial court suppressed the defendant's initial statement and the gun because he had not been given the *Miranda* warnings. The trial court also suppressed the defendant's other statements as evidence tainted by the *Miranda* violation.

Later, the New York Court of Appeals affirmed the decision of the trial court. In granting certiorari, the Supreme Court ruled that the ruling of the New York Court of Appeals was a final judgment for purposes of 28 U.S.C. § 1257, even though the defendant had yet to be tried in state court. The Supreme Court noted that the federal claim had been finally decided and later review of the federal issue could not be had whatever the ultimate outcome of the case. The Supreme Court observed that should the state convict the defendant at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should the defendant be acquitted, the state will be precluded from raising its federal claim again on appeal.

In the present case, the Petitioner was charged with the offense of driving while intoxicated. Prior to trial, the Petitioner filed a motion to suppress the results of the field sobriety test and breathalyzer test on the basis that the roadblock was unconstitutional. The trial court granted the motion. The Respondent appealed the ruling to the Court of Appeals. The Indiana appellate courts reversed the ruling of the trial court, stated that the roadblock was proper, and remanded the case for trial. The decision of the Indiana Supreme Court is not a final judgment.

If the Respondent convicted the Petitioner at trial, the Petitioner's claim that certain evidence obtained at the roadblock was improperly admitted into evidence would be proper for review. If the Petitioner, however, was acquitted at trial, the federal claim obviously would not be raised by the Respondent. Accordingly, the writ should be dismissed for lack of jurisdiction. *See Mincey v. Arizona*, 434 U.S. 1343, 1344, 98 S.Ct. 23, 24 (1977).

II.

WHILE THE INDIANA SUPREME COURT DECIDED A FEDERAL QUESTION, THE QUESTION IS NOT SUBSTANTIAL SINCE IT HAS ALREADY BEEN RESOLVED BY PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT

Under 28 U.S.C. § 1257, there must be a federal question to invoke the jurisdiction of the Supreme Court. The mere presence of a federal question will not warrant review, however, unless that federal question is "substantial." Even though a question as to federal law has been raised, if it appears that the question is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision or decisions of the Supreme Court so as to lack real controversy, the Supreme Court will not assume jurisdiction of the case. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S.Ct. 123 (1902); *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 (1922). Since the Indiana Supreme Court deemed that the roadblock at issue was constitutional and the decision was based on similar, recent United States Supreme Court opinions, the federal question is not substantial and the writ should be denied.

When a government official or law enforcement officer stops an individual and restrains his or her freedom of mobility, a "seizure," under the Fourth Amendment, has occurred. Indeed, in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 11 S.Ct. 1000 (1891), the Supreme Court stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Since a detention by means of the use of a roadblock constitutes a seizure within the meaning of the Fourth Amendment, it must be reasonable.

Federal law regarding the authority of law enforcement agencies to stop a vehicle and subject its occupants to questioning originated in cases involving the detection of illegal aliens near the Mexican border. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975), the Supreme Court addressed the practice of using roving patrols to stop vehicles to search for illegal aliens based upon criteria such as the apparent Mexican ancestry of the occupant. The Supreme Court concluded that although the public interest in stemming the flow of illegal immigrants into the United States was substantial, the intrusion of roving patrols was too great:

> [T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.

Id. at 883, 95 S.Ct. at 2581.

The requirement of individualized suspicion set forth in *Brignoni-Ponce*, was later rejected in *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976). In *Martinez-Fuerte*, the border patrol routinely stopped vehicles at a permanent checkpoint on a major highway away from the Mexican border for brief questioning of the vehicle's occupants. The defendant was charged with illegally transporting aliens and with other immigration offenses. The defendant moved to suppress evidence that was seized at the allegedly unconstitutional roadblock. The Supreme Court ruled that the detention of a vehicle, at a fixed checkpoint — even without reasonable suspicion that the vehicle contained illegal aliens, is consistent with

the Fourth Amendment. The Supreme Court balanced the public interest in preventing illegal immigration against the privacy rights guaranteed to individuals by the Fourth Amendment:

> This objective intrusion — the stop itself, the questioning, and the visual inspection — also existed in the roving patrol stops. But we view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop.

Id. at 558, 96 S.Ct. at 3083.[9]

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), the Supreme Court authorized the continued use of roadblocks and checkpoints. In *Prouse*, a police officer stopped the defendant's vehicle to conduct a routine license and registration check. The officer had no probable cause or reasonable suspicion that the defendant or any passengers in the vehicle had violated any law or regulation at the time of the stop. When the officer, however, approached the vehicle, he smelled marijuana smoke and seized a bag of marijuana lying in plain view on the floor of the car. The defendant was charged with illegal possession of a controlled substance. The defendant moved to suppress the marijuana seized during the investigatory stop on the basis that the

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[9] The Supreme Court observed that the following procedures were used by the border patrol officers at the fixed checkpoint: (1) a large sign was located one mile before the checkpoint with flashing lights warning, "ALL VEHICLES, STOP AHEAD, 1 MILE"; (2) three quarters of a mile later, two more signs over the highway with flashing lights read "WATCH FOR BRAKE LIGHTS"; (3) the checkpoint was located at a California State weigh station; (4) at the checkpoint, two large flashing signs read "STOP HERE--U.S. OFFICERS"; (5) orange traffic cones were placed on the highway funneling traffic into two lanes where a border patrol agent in full uniform stood beside a sign reading "STOP"; (6) U.S. border patrol vehicles, with flashing lights, blocked traffic in unused lanes; (7) a permanent building was used for temporary detention facilities; (8) floodlights were used during nighttime operation; (9) a "point agent" usually screened vehicles as he brought them to virtually a complete stop, and if further investigation was necessary, directed motorists to a secondary investigation area; (10) average duration of stop in secondary investigation was three to five minutes. *United States v. Martinez-Fuerte*, supra, 543 U.S. at 545-546, 96 S.Ct. at 3076-3078.

stop was unconstitutional.[10] On appeal, the Supreme Court balanced the defendant's Fouth Amendment interests against legitimate governmental interests.

In reviewing the privacy interests of individuals subjected to random stops, the Supreme Court recognized the importance of travel and observed that individuals find a greater sense of security in traveling in an automobile than in other modes of travel. The Supreme Court noted that an individual operating or traveling in a vehicle does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. In addition, the Supreme Court acknowledged that states have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that the vehicles are fit for safe operation, and that licensing, registration, and vehicle inspection requirements are being observed. The Supreme Court determined, however, that the enormity of the intrusion of a program of roving spot checking was not sufficiently productive to justify the invasion upon Fourth Amendment interests. The Supreme Court stated, however, that questioning all oncoming traffic at a roadblock-type stop might tip the balance of interests in favor of precluding a requirement of reasonable suspicion because a permanent checkpoint is less intrusive than random stops. Finally, the Supreme Court noted:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. *This holding does not preclude the State of Delaware or other States from developing methods for spot checks that*

[10] At the suppression hearing, the officer stated that at the time he stopped the defendant, he was not acting pursuant to any standards or procedures governing roving patrol stops.

> *involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.* We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. (Emphasis added).

Delaware v. Prouse, 440 U.S. at 664, 99 S.Ct. at 1401.

Later, in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979), the Supreme Court declared a Texas statute unconstitutional under the Fourth Amendment where it allowed police to detain a person and require that person to identify himself, even where the officers lacked probable cause or any reasonable suspicion to believe that the person was engaged or had engaged in criminal conduct. The Supreme Court stated:

> A central concern in balancing [the competing] considerations of public need and individual liberty has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. (Citations omitted). To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers.

Id. 443 U.S. at 51, 99 S.Ct. at 2640.

In the case at bar, the stopping of the Petitioner's vehicle was a seizure within the meaning of the Fourth and Fourteenth Amendments and was required by those amendments to be reasonable. Applying the principles of the foregoing cases, it is necessary to balance the public interest in roadblocks against the Petitioner's Fourth Amendment interests. There can be no doubt that there is an overwhelming public and governmental interest in pursuing methods to curtail the unsafe driver. The use of a traffic safety roadblock has principally two purposes: (1) to apprehend and to remove the drunk or unlicensed driver

from the streets before injury or property damage results, and (2) to serve as a deterrent to convince the drunk or unlicensed driver to refrain from driving in the first place.

An opinion of a federal court of appeals, decided subsequent to *Delaware v. Prouse*, *supra*, provides assistance in an identification of factors that are significant to a determination of whether a roadblock spot check method of discovering unsafe drivers is a sufficiently reasonable accommodation of the public's interest in highway safety with the individual's right to personal security so as to be permissible under the United States Constitution. In *United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981), *cert. denied*, 454 U.S. 832, 102 S.Ct. 130 (1981), the court considered a roadblock operated by two New Mexico state police officers for the avowed purpose of checking drivers' licenses and vehicle registrations. The roadblock was conducted with the permission of the officers' supervisor. All westbound vehicles, except semi-trucks, were to be stopped. When the vehicles began to pile up, the officers allowed the vehicles to pass and did not resume checking until traffic had cleared. The Court of Appeals stated:

> In our view, the roadblock stop of the [defendant's car] does not run afoul of the rule of *Prouse*. While this may not have been a '100% roadblock' of the type referred to in *Prouse*, it is nonetheless a long way from the selective, single car stop denounced in *Prouse*. In the instant case, the New Mexico state police were attempting to stop all westbound traffic on an interstate highway, insofar as was humanly possible. The decision not to stop trucks was reasonable under the circumstances, because, presumably, they had all been stopped at a port of entry. The purpose of the roadblock, *i.e.*, to check drivers' licenses and car registrations, was a legitimate one. If, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes. *See United States v. Merryman*, 630 F.2d 780, 782-85 (10th Cir. 1980). Furthermore, allowing all the stopped cars through when traffic became congested was also reason-

> able and, in our view, non-violative of the rule of *Prouse*. In sum, the roadblock stop of the [defendant's car] was, under the described circumstances, constitutional.

Id. at 856-857.

Several courts have indicated that under the proper circumstances, roadblocks — even for the express purpose of detecting intoxicated drivers, could meet the constitutional restrictions and be valid. For example, in *Commonwealth v. McGeoghegan*, 389 Mass. 137, 141, 449 N.E.2d 349, 353, (1983) the Massachusetts Supreme Court identified the following criteria: (1) that the inconvenience to the motorist be minimized; (2) that the selection of the cars to be inspected be non-arbitrary; (3) that the safety of the motorists be assured; (4) that the roadblock be systematic in nature; and (5) that the roadblock be established pursuant to a pre-arranged plan of law enforcement which is established by supervisory personnel.[11]

Applying the foregoing criteria to the roadblock in the case at bar, the roadblock clearly passes constitutional muster. The roadblock in question was a joint effort of the Indiana State Police and the Hendricks County Sheriff's Department. The roadblock was implemented in accordance with a plan that had been previously devised by the Marion County and Morgan County Police Departments. Prior to the roadblock, the State Police publicized, in various newspapers, the general plan to conduct roadblocks but did not specify the location of the

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[11] In *State v. Deskins*, 234 Kan. 529, 542, 673 P.2d 1174, 1185 (1983), the court suggested that the following factors be considered in determining whether a roadblock, conducted to detect drunk drivers, meets the balancing test in favor of the state: (1) the degree of discretion left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice given to the public; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type, and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

roadblocks. In addition, the particular location of the roadblock at issue was selected by a member of the sheriff's department and the supervisor of the State Police in Hendricks County. The decision was based upon information, obtained from State Police records, which disclosed that the particular location generated numerous fatal and nonfatal accidents involving alcohol.

According to the plan, westbound traffic on U.S. 40 was stopped by approximately eleven uniformed officers who were visible on the highway. These officers blocked off the left westbound lane whereby all traffic was funneled into the right westbound lane by means of flares and the lights from police cars.[12] Non-selectively, cars were stopped in consecutive groups of five.[13] Absent the detection of drinking or other violations, drivers were detained for no more than two or three minutes during which time other traffic was permitted to pass. After a group of five vehicles had been inspected and released, the next group of five cars traveling west was detained and the procedure was repeated.

Upon the discovery of an operating violation or alcohol consumption was detected, the driver was instructed to drive into a nearby parking lot. A driver suspected of alcohol consumption was given a field blood alcohol test. Any driver whose blood alcohol content was over the presumptive limit of .10 was transported to the Hendricks County jail where a breathalyzer test was administered. If the driver failed the breathalyzer test, he or she was arrested.

The roadblock, in this case, did not involve the unbridled discretion of the officer in the field which was deemed oppressive and subject to abuse in *Prouse*. In view of the considerable injury and damage caused by the drunk driver, as well as, the vital interest of every citizen in being protected

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[12] In addition, the roadblock area was well-lighted. Indeed, numerous motorists, upon sighting the roadblock, reversed their direction and fled.

[13] The officers had absolutely no discretion to depart from this procedure.

upon the highways, the public interest in a properly conducted roadblock outweighs the individual's right to be free from unfettered intrusion upon his or her Fourth Amendment rights. The initial stop of the Petitioner, in this case, was under conditions which met the requirements for a constitutional momentary seizure and the resultant seizure was not unreasonable under the Fourth Amendment. Accordingly, since the Petitioner has failed to present a substantial federal question, the writ must be dismissed.

CONCLUSION

For the foregoing reasons, the Respondent, the State of Indiana, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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